Supreme Court, U.S.
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No. 93-759

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

ESTATE OF BAYLESS MILTON HESTER, III, DECEASED, AND EVALYNN JORDAN HESTER,
Petitioners

VS.

NATIONSBANK, JOSEPH N. PROTHRO, FEDERAL DEPOSIT INSURANCE CORPORATION, JACK G. BANNER, JOHN D. PENN, JOHN A. LEONARD, STEPHEN C. STAPLETON, FLOYD STYLES, SINCLAIR BALCH, KEVIN MERRITT, AND SUMMIT RESOURCES, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF OF FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-759

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

Estate of Bayless Milton Hester, III,
Deceased, and Evalynn Jordan Hester,
PETITIONERS

vs.

NationsBank et al.
RESPONDENTS

PETITIONERS' REPLY TO BRIEF OF THE
FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC")
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

Petitioners hereby reply to Brief filed by FDIC in opposition to the petition for writ of certiorari, without conceding that that FDIC as a Corporation has legal standing to file briefs in appeals from CA 7:88cv-0076 or to appear in suit CA 7:88cv-0076 or in the Hesters' personal bankruptcy proceedings.

REPLY TO STATEMENT OF JURISDICTION

Petition concerns limits of bankruptcy jurisdiction. Challenges to jurisdiction have

not been addressed. Contrary to accepted practice, Opinion of August 31, 1993 omits to state basis for its own jurisdiction and for jurisdiction in the lower courts.

1. Bankruptcy Court cannot recognize FDIC as party to Chapter 11 after NationsBank has been named successor in interest (neither FDIC or NationsBank ever filed a claim); set aside District Court reversal of trustee appointment and actions; issue trustee powers after Plan confirmation; ignore stay orders or District Court's preliminary injunction on a Plan on appeal; modify a Plan on appeal or accept modifications from non-proponents; implement a stayed Plan by illegal means; appoint an attorney ad litem to sign secret documents after confirmation of a trustee-less Plan; rule in a noncore adversary proceeding without consent; deny a motion to vacate an order on appeal; or order Rule 9011 sanctions without jurisdiction. Rule 9011 sanctions require

subject matter jurisdiction. See Port Drum Co. v. Humphrey, 852 F.2d 158.

2. All Hester cases were transferred in December 1991 from the docket of District Judge The Honorable Mary Lou Robinson to District Judge The Honorable David O. Belew.

Judge Belew, unfamiliar with case record, affirmed void bankruptcy orders and ruled in non-existent and moot cases. He unfiled pleadings referring to trustee reversal, stay on the Plan, missing assets and litigation of NationsBank as party in interest.

Judge Belew closed CA 7:88cv-0076 on the basis it could be settled by a Plan that had never been heard, in a court that lacked consent and jurisdiction over parties. He entered six orders substituting FDIC as the party in interest for NationsBank without jurisdiction despite the final order (Pet.App. A66) that NationsBank was party in interest. A District Court stay was in place on the

confirmed reorganization Plan until a hearing occurred. Judge Belew falsely and without jurisdiction said the stay Order of July 24, 1991 (Pet. App. A48) was a 10 day TRO.

3. Order closing CA 7:88cv-0076 in Pet. App. A56 lacks finality for appellate review under 28 U.S.C. Section 1291. Having dismissed appeal of this Order for lack of jurisdiction on June 8, 1992, the Fifth Circuit still does not claim jurisdiction (Pet.App. A4). Without a final order before the Court, a confirmed Plan of record or signed releases of record anywhere, and without consent of parties or bankruptcy jurisdiction over parties in CA 7:88cv-0076, finding res judicata is error.

4. Discretion does not exist without jurisdiction. Appealing orders such as Pet. App.A58 and A63, worded for both substantive and interlocutory interpretation, is not frivolous.

REPLY TO STATEMENT OF THE CASE

1. See General Propositions In Opposition.

a. Petitioners' claims against NationsBank and Mr. Prothro are not limited to claims and charges in CA 7:88cv-0076.

FDIC cannot assume liabilities for Mr. Prothro. FDIC cannot replace NationsBank. See Proposition 4. Under the reasoning of Marathon, validity of the notes held by NationsBank has not been determined by court of competent jurisdiction. After final order ruling NationsBank successor in interest to First RepublicBank (Pet. App. A66), FDIC as Receiver had no legal standing in Hester bankruptcy. District Judge Belew's order substituting FDIC as a party in CA 7:91cv-0093 (appeal of the Plan confirmation order) was signed January 22, 1992 and was moot, as his dismissal of that case on January 13, 1992 for want of prosecution was appealed January 21, 1992 and Fifth Circuit upheld dismissal on October 22, 1992.

FDIC Brief veils FDIC Corporation's difference from FDIC acting as receiver of a failed bank. Nothing gives FDIC standing to appear in CA 7:88cv-0076. FDIC briefings in CA 7:88cv-0076 appeals should be stricken.

b.Bankruptcy Court could not insert a trustee or trustee powers into a Plan it confirmed while District Court was ruling on the trustee matter. Proposed set of Mutual Releases exceed jurisdiction. Pet.App. A68-77.

c. Opinion of August 31, 1993 reviews a non-final order and overlooks the necessity for proving res judicata. The Judges did not look at the Plan or its alleged releases.

The Order of January 3, 1992, was appealed for the second time on November 19, 1992. CA 7:88cv-0076 docket dates this appeal November 20, 1992, despite a Fifth Circuit letter giving correct date as November 19 and other letters to District Clerk requesting correction. With Order closing case on appeal

as of November 19, no later orders were properly entered. An Order To Dismiss and the Order Denying Motion To Reopen are moot.

d. Petitioners' adversary proceeding titled 'Combined Motion To Revoke For Fraud The Second Amended and Joint Restated Plan of Reorganization As Modified, Motion To Vacate Plan For Lack of Notice, Motion For Turnover Of Estate Assets, Motion For Sanctions Motion For Return of Property To Estate and Motion To Compel Production of Records' was never heard. Motion to vacate (FRCP 60b) was unavailable to jurisdiction while the Plan was on appeal.

REPLY TO ARGUMENT

1. See General Propositions In Opposition.

Court of Appeals erred or abused discretion to declare settlement of CA 7:88cv-0076 by res judicata through review of a non-final order locating settlement in a court without jurisdiction. Bankruptcy Court lacked the jurisdiction over parties to litigate CA

7:88cv-0076. No bankruptcy party to the Plan had standing to ask dismissal of claims vested in Petitioners personally. Bankruptcy Court lacked jurisdiction to order settlement of Petitioners' claims against Joseph N. Prothro Individually. Res judicata has not been proved. The confirmed Plan has not been heard. Transcript of a confirmation hearing was not filed of record until Mrs. Hester sued the Court Reporter in CA 7:93cv-0114-J.

In CA 7:88cv-0076, the Plan is not on file. Neither NationsBank nor FDIC has asserted a bankruptcy proof of claim. Releases are not known to exist.

2. See Propositions 6, 7, and 8.

GENERAL PROPOSITIONS,
ARGUMENTS AND AUTHORITIES

1. Opinion of August 31, 1993, conflicts with Marathon and other Opinions of this Court, Fifth Circuit Opinions of June 4,1992 and October 22, 1992, 11 U.S.C. Section 1104, Constitutional Amendments IV, V, VII and XIV

and practices of stating jurisdiction, proving res judicata and random case assignment.

Alleged settlement of CA 7:88cv-0076 through releases conflicts with absence of valid releases and conflicts with the Opinion at Pet.App.A29 which mooted appeal of the order appointing ad litem attorney. The appeal was mooted because Plan confirmation mooted post-confirmation issue of trustee powers contrary to statutory prohibition in 11 U.S.C. Section 1104, and Constitutional Amendments IV, V, VII, and XIV. Cited case In re Texas Extrusion, 844 F.2d 1142, conflicts with the Bankruptcy Code and Constitutional guarantees.

FDIC pretends against the law and the law of the case to legal standing in CA 7:88cv-0076 and Hester Chapter 11. Releases of NationsBank from liability do not exist. Recognizing the FDIC substantively conflicts with the Order of June 4, 1992 (Pet. App. A36) which dismissed for lack of jurisdiction after

FDIC attorneys said orders were purely procedural. It also conflicts with the Opinion in Pet.App. A29) which upheld dismissal of appeals on January 13, 1992, making party substitution impossible on January 22, 1992. See Proposition 4.

See also Pet.45. Consent is required for bankruptcy jurisdiction over non-core matters under Marathon and other Circuit opinions.

2. Jurisdictional challenges have not been addressed.

See Reply To Statement of Jurisdiction.

Without trustee powers within the Plan, Bankruptcy Court lacked avenue to consent or jurisdiction over settlement of CA 7:88cv-0076. Marathon allows no core jurisdiction over state law frauds and torts in a pre-petition lawsuit, including fraud in the factum charges and claims for withholding operational expenses. Bankruptcy Court had no jurisdiction to settle Petitioners' personal

claims against Joseph N. Prothro Individually as the chief malefactor in CA 7:88cv-0076. The Plan did not refer to FDIC, which was not a party or a creditor. The trustee-less Plan confirmed lacks legal means to convey properties. Plan has no provision to appoint trustee or ad litem attorney.

3. Res judicata has not been proved.Four FDIC criteria have not been met. Fraud charges have not been heard or litigated.

FDIC res judicata criteria are unmet.

1) Chapter 11 787-70262 and CA 7:88cv-0076 did not involve the same parties. Debtors did not propose Plan; FDIC falsely implies a "Petitioners' plan". Individual Defendant Joseph N. Prothro is not a creditor or party to the Chapter 11. NationsBank and FDIC Receiver appeared in the Chapter 11 but filed no claims. For FDIC, see Proposition 4. Bankruptcy Court lacks jurisdiction over NationsBank, FDIC, and Joseph N. Prothro.

Plan confirmation released Petitioners personally. The Plan could not settle CA 7:88cv-0076 without Petitioners' consent.

2) Petitioners' claims against NationsBank and Mr. Prothro are nowhere released within the Plan. Without a trustee or jurisdiction over parties to CA 7:88cv-0076, the suit is outside bankruptcy jurisdiction.

3) There is no final judgment on the merits of CA 7:88cv-0076. An appellate court cannot declare an unproven issue res judicata through review of a non-final order.

4) The causes of action in the lawsuit and the Plan were not the same: see 1) above. Claims against Mr. Prothro are outside Chapter 11. FDIC denied consent to jurisdiction.

There is no res judicata without opportunity for litigation. A court with competent jurisdiction is prerequisite for litigation. Res judicata does not apply to non-jurisdictional orders procured by fraud or

fraud on the court or without hearings. No order forbids Petitioners to file suit on matters never litigated. See Proposition 5.

4. FDIC has no standing.

a. FDIC has filed no claim; NationsBank never filed claim. Under Marathon reasoning, Bankruptcy Court lacked jurisdiction to determine CA 7:88cv-0076 against NationsBank, FDIC, or Joseph N. Prothro (neither creditor nor party to the Chapter 11) or any other claims against parties outside jurisdiction.

b. FDIC Brief in CA 7:89cv-0001 at 10 says "All assets, including the Hesters' asset, were transferred to the bridge bank, NCNB Texas NationsBank, pursuant to 12 U.S.C. Section 1821(i) and Article 2.1 (k) of the Purchase and Assumption Agreement approved by the United States District Court for the Northern District of Texas, Cause No. CA-7-88-0091 (1988)." At 12, the Brief says "FDIC does not have a claim or own property in the

Hesters' bankruptcy; it was transferred to NCNB. FDIC has never consented to bankruptcy court's jurisdiction." and "The (receivership) court authorized FDIC's transfer of claims, property and liability to NCNB." At 24-25, the Brief argues regarding the 1984 Amendments, that without consent Bankruptcy courts under Marathon's guidelines are not allowed to determine actions by the estate against defendants who have not asserted claims.

5. Frauds of the Plan and motions to vacate void orders and parts of orders are before District Court in CA 7:93cv-0114-J, The Honorable Mary Lou Robinson presiding. Judge Belew recused himself.

Petitioners sued Respondents NationsBank. Mr. Prothro and others for missing assets, obstruction of reorganization, contempts, frauds and frauds upon the court, and civil rights violations on June 28, 1993. Motion to vacate the Plan's order of confirmation and/or

void parts of that order is presently pending.

This suit is docketed with The Honorable Mary Lou Robinson. District Judge The Honorable David O. Belew, Jr. and other District Judges filed to recuse themselves.

Respondents and others have moved that Mrs. Hester be declared in contempt and imprisoned.

6. Petitioners have been denied hearings or any day in court.

There have been no hearings on the Plan actually confirmed, on any motion to vacate the Plan's order of confirmation under FRCP 60b, on circumstances of Plan confirmation, on alleged frauds or any unknown releases or settlements. Bankruptcy Judge McGuire denied motion to revoke the Plan for fraud without a hearing on grounds the motion was time-barred.

There were no proper hearings on the initial trustee appointment or alleged bankruptcy re-appointment after Plan confirmation, on the order appointing Jay

Cantrell ad litem attorney or any documents secretly signed by Mr. Cantrell, on a non-core adversary complaint, on frauds and false testimony in procuring Plan, on post-Plan contempt and fraud, or closing CA 7:88cv-0076.

7. Unacknowleged facts: Confirmed Plan has never been heard on the merits. Drastic changes intervened between proposal and hearing and entry of confirmation order.

Record shows no hearings on trustee appointment, confirmed Plan, adversary complaint, motion to vacate Plan under FRCP 60b, or closing CA 7:88cv-0076.

Documentation of trustee reversal, preliminary injunction on Plan, concealment of assets, refusal of consent to jurisdiction over adversary proceeding, and litigation of NationsBank as party in interest was sent up on appeal. Case record has been ignored.

8. Due process has been denied.

Without proper hearings and trial of

fraud charges, Mrs. Hester cannot be personally compelled to sign bits of the Plan alleged fraudulent. She personally is no longer under bankruptcy jurisdiction. See Propositions 10 through 14, Pet.53-63.

CORRECTIONS OF ERRORS

1. FDIC Brief falsely implies standing to appear. See Proposition 4.

2. Bankruptcy Court's 9011 sanctions forbid only bankruptcy actions without an attorney and are void because of lack of jurisdiction. See Port Drum v. Humphrey, 305 U.S. 165. District Judge Belew's orders appealed preclude filings only on matters settled in Bankruptcy Court. (Pet. App. A62)

3. There have been no hearings. Fraud charges have not been litigated.

4. Stoll v. Gottlieb, 305 U.S.165 (1938), unlike this case, pertains to state court and assumes the day in federal court Petitioners have been denied. That plan was filed by the

debtor, heard, freely accepted by Stoll, and accused of no frauds. That motion to vacate (at 169) was not ruled on with the plan on appeal. The opinion discusses jurisdiction, and says at 172 that fraud allegations mean res judicata or jurisdiction error may be questioned in a later suit.

5. FDIC Brief conceals that Respondents and others tried to relitigate final orders: they wanted a preliminary injunction called a 10-day TRO; re-appointment of a reversed trustee and exercise of trustee powers; an ad litem attorney contrary to law and Plan provisions; and FDIC found party in interest.

6. Appealing orders found to be interlocutory was not frivolous, as many orders were worded for both interlocutory and final interpretation, e.g. Pet.App. A58, A63.

7. Petition at page 10 should read: "There was no bankruptcy jurisdiction for reappointment of trustee, issue of trustee

powers, or approve pay for trustee actions (see Cases 93-1135, 92-9052, 93-1136)."

REPLY TO CONCLUSION

Review of this case is warranted because the Opinion does not establish jurisdiction, or proof for res judicata. It conflicts with Opinions of this court, Fifth Circuit Opinions and opinions from other Circuits, Bankruptcy Code and Constitutional guarantees.

Opinion from this Court would facilitate legal resolution of issues and charges in CA 7:93cv-0114-J, and prevent Respondents from using an erroneous opinion to protect their profits from actions alleged frauds, torts, contempts and frauds upon federal courts.[1]

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1 These appeals were not randomly assigned but sent to the same three Judges. If the Opinion of August 31, 1993 is reversed, a different panel of judges is requested on any return to Fifth Circuit. Petitioner has also requested that FDIC Brief be stricken; and that any remand of suit CA 7:88cv-0076 or Hester bankruptcy appeals cases be determined before the U.S. District Court in CA 7:93cv-0114-J, and not before District Judge David O. Belew, as Judge Belew has recused himself from considering matters in that case.

Dated:

Respectfully submitted,

_____

EVALYNN JORDAN HESTER as

Evalynn Jordan Hester Individually
and as Independent Executrix of
Estate of Bayless Milton Hester,
III, Deceased

Petitioner pro se